

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 33

HH3 TRUCKING, INC.

Employer

and

Case 33-RC-4792

TEAMSTERS LOCAL 325, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

The Employer, HH3 Trucking, Inc., is engaged in the business of hauling construction material, such as concrete, dirt, gravel and sand, for commercial customers in northern Illinois. The Petitioner, Teamsters Local 325, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time drivers employed by the Employer at its Rockford, Illinois facility excluding owner-operators,¹ office clerical employees, guards and supervisors as defined in the Act. A hearing officer of the Board held a hearing and the parties filed briefs with me, which I have carefully considered.

As evidenced at the hearing and in the briefs, the parties disagree on one issue: whether the drivers are independent contractors excluded from the statutory definition of employee under Section 2(3) of the Act. Contrary to the Petitioner, the Employer contends that the drivers are independent contractors and therefore the petition should be dismissed.

I have considered the evidence and the arguments presented by the parties on these issues. As discussed below, I have concluded that the drivers are employees within the

meaning of the Act. Accordingly, I have directed an election in the petitioned-for unit, which currently consists of approximately four employees.²

I. OVERVIEW OF OPERATIONS

The Employer contracts with construction contractors to perform hauling services within a 50 to 100 mile radius of the Employer's facility. The Employer owns seven trucks, both tractor/trailers and tandems, although only four trucks have been in operation during 2003. The Employer is either paid an hourly fee depending on the type of truck used, or by the tonnage of material hauled. The contractor determines the method of payment and the amount is negotiated. Currently, the Employer performs most of its work for three contractors and 75 percent of the work assigned to the drivers is for a single contractor. The Employer's co-owners, Gretchen and William Hudson, are solely responsible for the management and supervision of the Employer's operations.

II. STATUS OF DRIVERS

A. DISCUSSION OF RELEVANT FACTORS

1. The Lease Agreement

All drivers are informed at the outset that they must sign a lease agreement in order to drive for the Employer. However, the lease may not actually be signed until sometime after the driver starts driving for the Employer, in some instances weeks or months later. The drivers are required to sign a new lease each calendar year. The terms of the leases are few, with some variations. Two of the current drivers have signed leases for 2003 that provide only as follows:

Motor Vehicle Lease Agreement.

¹ The parties stipulated that approximately 15 owner-operators are properly excluded from the petitioned-for unit.

² In addition to the four current employees, I take administrative notice of the fact that three unfair labor practice charges have been filed against the Employer alleging, inter alia, that drivers Mark Freeman, Arthur Johnson, and Keith Cadley were terminated in violation of Section 8(a)(1) and (3) of the Act. In these circumstances, I shall permit these employees to vote subject to challenge. *The Tetrad Co., Inc.*, 122 NLRB 203, 204 (1958)

I understand clearly that by leasing said truck from or with, H & H3 Trucking Inc. I am responsible for all taxing, all insurances, and unemployment obligations. H & H3 Trucking Inc. is not obligated to pay any taxes, insurances, or unemployment for truck leasers.

The other two drivers have signed leases for 2003 that provide in addition to the above:

The agreed compensation is 25% of what the truck makes per day. Truck insurance and gas obligations will be worked out with honors.

The record does not establish the reason for the variation.

The drivers are not required to make any payments for the use of the truck or to enter into or terminate the lease. Although the drivers are assigned specific trucks, the assignments change on an as-needed basis and are not reflected in the lease. Either party may terminate the lease at any time. The drivers are not permitted to transfer or sell their lease or to have other drivers operate their assigned vehicle. The Employer pays for license fees, fuel, vehicle insurance costs, and covers the drivers under its commercial general liability policy. The Employer pays for the repair and maintenance of its trucks, however, drivers pay for any damage resulting from their negligence. All drivers are responsible for their workers' compensation and unemployment insurance costs.

2. Compensation

The record establishes that prior to April 2003, the Employer paid employees an hourly wage with overtime after 40 hours per week. In April 2003, the start of the Employer's work year, the Employer asserts it commenced paying the drivers at the rate of 25 percent of the Employer's receipts for the driver's truck minus certain maintenance costs. The Employer did acknowledge that even under this system, the Employer ensured that the drivers received at least the same hourly rate that they had previously received, regardless of the truck's earnings. One driver testified, however, that despite being informed of the new pay policy, he believed he was still paid by the hour. The drivers' paystubs reflect only gross pay and the drivers are provided no documentation showing how pay is computed nor does the record contain any such

documentation or explanation. The Employer does not withhold federal or state income tax from checks issued to the drivers and issues each driver a Form 1099 at the end of the year. The drivers receive no benefits, such as health or life insurance, or paid vacation.

3. Duties and Responsibilities

All drivers must possess a valid CDL license and Department of Transportation card, pass a physical exam, and have a telephone. Drivers are required to display the logo “Leased to HH3 Trucking” on their trucks. Drivers do not wear uniforms. The Employer pays for the lease of a padlocked yard to store its trucks at night. The Employer requires drivers to park the trucks in the yard unless they obtain the Employer’s approval to park elsewhere. The Employer schedules all drivers and assigns them to particular contractors on a daily basis. Each workday, the drivers are required to report to the yard at 5:30 a.m. If the drivers are late, the Employer may assign another driver to drive their truck or may contact the driver to ascertain his whereabouts. After inspecting and fueling their vehicles, drivers report to the job site to which they have been assigned. The Employer does not require drivers to take a particular route to a job site, but will provide directions upon request.

Upon arriving at the job site, the driver talks to the contractor’s foreman to learn his work assignment. At the conclusion of the workday, as determined by the contractor, the foreman signs the driver’s timesheet, which indicates the hours the driver worked and whether the Employer is billing by the hour or by the ton. The co-owners periodically go to job sites to monitor the drivers. Drivers are directed to leave the keys in the trucks upon returning them to the yard at the end of each workday. The Employer questions drivers as to their whereabouts if they fail to return to the yard immediately after being released from a job. At the end of a workweek, the drivers submit their timesheets to the Employer. The Employer bills its customers on a weekly basis.

4. Proprietary Interest

Drivers are prohibited from individually negotiating compensation agreements with contractors or with the Employer apart from the lease. Drivers have no say in deciding job assignments. Drivers do not reject job assignments or truck assignments. Drivers do not use their assigned trucks for any purpose other than working for the Employer and are prohibited from allowing others to drive their trucks.

5. Termination of Leases

The leases are terminable at will by either party with no payment or notice required. If notice is given, it is verbal. The Employer has a policy of terminating a lease if the driver fails to respond to a dispatch and the owners are unable to contact a driver for several days. The Employer simply finds a new driver to lease the truck. The Employer has threatened to terminate the lease of a driver who refused to drive a particular truck. The Employer might also terminate a lease due to damage to a vehicle caused by a driver. The Employer's Co-owner William Hudson has issued oral warnings to a driver for insubordination. If a driver is unable to report to work as scheduled, he is not paid for the day and the Employer will find another driver to drive the truck.

B. OVERVIEW OF APPLICABLE LAW

The burden of proving independent contractor status rests on the party asserting that such status exists. See *BKN, Inc.*, 333 NLRB 143, 144 (2001). Section 2(3) of the Act excludes "any individual having the status of an independent contractor" from the definition of "employee." The Board applies a common-law agency test in determining whether an individual is an independent contractor or an employee. See *Roadway Package System, Inc.*, 326 NLRB 842, 849 (1998); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998). Under the common-law agency test, "all the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968).

C. ANALYSIS

As previously noted, the Petitioner contends that all drivers should be included in the unit found appropriate herein, while the Employer maintains that drivers are independent contractors and are not “employees” under the Act. Applying the common-law agency test to the facts of this case, I find that the factors weigh heavily in favor of employee status for the petitioned-for drivers.

The record reveals that the drivers do not operate independent businesses. Rather, the Employer controls the manner and means by which the drivers perform their services. The drivers haul exclusively for the Employer, and perform functions that are essential to the Employer’s normal operations as a construction hauling service. The Employer requires drivers to pass a physical examination before approving them to drive. The drivers drive the Employer’s trucks on which they are required to display the Employer’s logo. The Employer provides drivers with daily assignments from which they cannot deviate. Drivers are required to report to the yard at the beginning and end of each workday. After work drivers are required to park the trucks in the yard with the keys inside unless the Employer gives them permission to park elsewhere. Drivers are subject to verbal warnings and risk having their leases terminated if they refuse an assignment, damage a truck, or cannot be reached by the Employer over several days. Thus, the control exercised by the Employer over the aspects of its relationship with the drivers supports a finding of employee status. See *Roadway Package System, Inc.*, supra at 851; *R.W. Bozel Transfer, Inc.*, 304 NLRB 200, 201 (1991).

The record further reveals that drivers have no significant proprietary interest or entrepreneurial opportunity for gain or loss. The Employer owns the trucks and pays for virtually all expenses such as insurance, license fees, maintenance, and fuel. The Employer determines the rate of compensation paid to the drivers and ensures that the drivers receive at least a minimum hourly rate. The Employer also controls the rates charged to customers and requires

the drivers to work as long as the customer demands. Drivers are prohibited from hiring replacement drivers to drive their trucks and cannot drive their trucks for other employers. Drivers do not pay the Employer to enter into leases, cannot sell or transfer their leases, and are not compensated if their leases are terminated. Thus, the lack of drivers' entrepreneurial opportunities also supports a finding of employee status. See *Slay Transportation Co.*, 331 NLRB 1292, 1294 (2000); *Roadway Package System, Inc.*, supra at 851; *C.C. Eastern, Inc.*, 309 NLRB 1070, 1070 (1992).

Not all of the evidence supports a finding of employee status. The Employer does not provide drivers with any employment benefits, such as health insurance, life insurance, workers' compensation insurance, unemployment insurance, or paid vacation. Additionally, the Employer does not withhold income tax from drivers' paychecks. See *Diamond L Transportation, Inc.*, 310 NLRB 630, 630 (1993). However, these factors do not outweigh the overwhelming indicia of employee status. *Roadway Package System, Inc.*, supra at 854. Having applied the common-law agency test and weighing all the incidents of their relationship with the Employer, I find that the drivers are employees within the meaning of the Act.

III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers employed by the Employer at its Rockford, Illinois facility, EXCLUDING owner-operators, office clerical and professional employees, guards and supervisors as defined in the Act.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees in this unit will vote on whether or not they wish to be represented for the purposes of collective bargaining by Teamsters Local 325, International Brotherhood of Teamsters, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used in communication with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Subregional Office within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Subregional Office at 300 Hamilton Boulevard, Suite 200, Peoria, Illinois 61602, on or before **August 12, 2003**. No extension of time to file the list will be granted except in extraordinary circumstances, nor shall the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (309)-671-7095. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by

facsimile, in which case no copies need be submitted. If you have any questions, please contact the Subregional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer shall post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. The Board in Washington must receive this request by **August 19, 2003**. The request may not be filed by facsimile.

Dated August 13, 2003
at Saint Louis, Missouri

Ralph R. Tremain, Regional Director
National Labor Relations Board, Region 14
and Subregion 33

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460-7550-6200